

**FILED**

October 25, 2005

Clerk, U.S. Bankruptcy Court

Below is an Opinion of the Court.

  
ELIZABETH PERRIS  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In Re: ) Bankruptcy Case  
          ) No. 04-37154-elp11

ROMAN CATHOLIC ARCHBISHOP OF )  
PORTLAND IN OREGON, AND SUCCESSORS, )  
A CORPORATION SOLE, dba the )  
ARCHDIOCESE OF PORTLAND IN OREGON, )  
Debtor. )

ROMAN CATHOLIC ARCHBISHOP OF )  
PORTLAND IN OREGON, AND SUCCESSORS, )  
A CORPORATION SOLE, dba the )  
ARCHDIOCESE OF PORTLAND IN OREGON, )  
Plaintiff, )

v. )

ACE USA, INC., a Delaware )  
corporation; CENTENNIAL INSURANCE )  
COMPANY, a New York corporation; )  
FIREMAN'S FUND INSURANCE COMPANY, )  
a California corporation; GENERAL )  
INSURANCE COMPANY OF AMERICA, a )  
member company of SAFECO INSURANCE )  
COMPANY OF AMERICA, a Washington )  
corporation; INTERSTATE FIRE & )  
CASUALTY COMPANY, an Illinois )  
corporation, INTERSTATE INSURANCE )

Adv. Proc. Case No. 04-3373

MEMORANDUM OPINION RE GENERAL  
INSURANCE COMPANY OF AMERICA'S  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT

1 GROUP, an Illinois corporation; )  
2 NATIONAL UNION FIRE INSURANCE )  
3 COMPANY OF PITTSBURG, a member )  
4 company of AMERICAN INTERNATIONAL )  
5 GROUP, INC., a Delaware )  
6 corporation; ONEBEACON AMERICA )  
7 INSURANCE COMPANY, a Pennsylvania )  
8 corporation, ST. PAUL FIRE AND )  
9 MARINE INSURANCE, a Minnesota )  
10 corporation; and CERTAIN JOHN DOE )  
11 INSURANCE COMPANIES, )  
12 )  
13 Defendants. )

14 General Insurance Company of America (General) moves for partial  
15 summary judgment on debtor Roman Catholic Archbishop of Portland's third,  
16 fourth, fifth and sixth claims for relief, which are asserted against  
17 Safeco Insurance Company of America (Safeco) and General only.<sup>1</sup> General  
18 asserts that it is entitled to summary judgment on the claims, because  
19 (1) they fail to state a claim under Oregon law; and (2) the claims are  
20 time-barred because they were filed more than two years after they  
21 accrued.

22 Debtor counters that the claims are cognizable under Oregon law and  
23 that they are not time-barred.

#### 24 THE CLAIMS

25 Debtor's complaint alleges that it has in the past and continues to  
26 defend itself in civil actions alleging sexual misconduct by Archdiocesan

---

27 <sup>1</sup> The complaint alleges that General is a wholly owned subsidiary  
28 and member company of Safeco, and refers to both companies together as  
29 "Safeco." Therefore, to the extent the complaint refers to Safeco, I  
30 understand that reference to include both Safeco and General. I will  
31 refer only to General in this Memorandum, as General alone is the moving  
32 party.

1 personnel during periods it was covered by insurance issued by General.  
2 According to the complaint, from 1994 through 2001, General defended and  
3 indemnified debtor in sexual abuse claims. However, according to the  
4 complaint, in 2001 General "abruptly changed its position and wrongfully  
5 denied (and continues to deny) any duty to defend and/or indemnify"  
6 debtor on the sexual abuse claims. Complaint ¶ 6. The complaint alleges  
7 that General contractually agreed through the insurance policies to  
8 provide a defense and indemnify debtor on the personal injury claims, and  
9 that it has refused or otherwise failed to honor its contractual  
10 obligations to defend and/or pay.

11 In the third claim, debtor alleges a breach of the contractual duty  
12 of good faith and fair dealing. It realleges that General owes debtor a  
13 duty to defend and to indemnify it under the insurance policies, that  
14 debtor is entitled under the policies to insurance coverage, and that  
15 General breached its obligations by refusing or failing to fully honor  
16 all obligations to pay. Debtor alleges that this failure constitutes a  
17 breach of the "contractually implied duties of good faith and fair  
18 dealing." Complaint at ¶ 57. Debtor seeks damages, including defense  
19 costs and indemnity, along with incidental and consequential damages,  
20 lost employee time, and lost earnings on amounts wrongfully withheld.

21 In the fourth claim, debtor alleges a tortious breach of the implied  
22 duty of good faith and fair dealing. It alleges that, in 1994, General  
23 began providing debtor with a defense on the sexual abuse claims and  
24 indemnified debtor for obligations arising on those claims. However, in  
25 2001, General "abruptly changed its position and wrongfully denied (and  
26

continues to deny) any duty to defend and/or indemnify" debtor for those claims. Debtor alleges that General agreed through the insurance policies to provide debtor with legal representation "and stand in the shoes of the Archdiocese for the purposes of defending and indemnifying" debtor against third-party claims. According to the complaint, "[t]he Archdiocese relinquished control over the defense of Underlying Claims to Safeco. The Archdiocese's monetary, property, and other interests were in the hands of Safeco." Id. at ¶ 64. Debtor seeks damages caused by wrongful refusal to defend and indemnify.

In the fifth claim, debtor alleges the tort of bad faith. It alleges that General's acts in changing its position and denying coverage represent bad faith and that, as a result of General's bad faith, debtor is entitled to recover its damages. It says General should be estopped from denying coverage.<sup>2</sup>

In the sixth claim, debtor alleges breach of fiduciary duty and/or enhanced obligation of fairness. It alleges that there is a fiduciary duty between General and debtor or that, in the alternative, General owes debtor "an enhanced obligation of fairness." Id. at ¶ 74. As a result of this breach, debtor alleges, it is entitled to recover damages caused by General's change in position and wrongful refusal to defend and indemnify.

#### DISCUSSION

Under Fed. R. Civ. P. 56(c), made applicable to adversary

---

<sup>2</sup> Debtor does not allege the elements of estoppel or argue that the fifth claim is one for estoppel.

1 proceedings by Fed. R. Bankr. P. 7056, the court shall grant summary  
2 judgment "if the pleadings, depositions, answers to interrogatories, and  
3 admissions on file, together with the affidavits, if any, show that there  
4 is no genuine issue as to any material fact and that the moving party is  
5 entitled to a judgment as a matter of law."

6 1. Are the claims cognizable under Oregon law?

7 General first argues that the allegations in the complaint fail to  
8 state claims under Oregon law, and therefore it is entitled to summary  
9 judgment on each of the four claims at issue in this motion. According  
10 to General, Oregon does not recognize tort claims based on an insurer's  
11 wrongful denial of insurance coverage.

12 Debtor responds first that the third claim for relief is a contract  
13 claim, not a tort claim. As for the fourth, fifth, and sixth claims for  
14 relief, debtor argues that they are tort claims cognizable under Oregon  
15 law. I will address the fourth, fifth, and sixth claims first.

16 A. Fourth, Fifth, and Sixth Claims for Relief

17 General argues that it is entitled to summary judgment on these  
18 claims as a matter of law because, under Oregon law, even a wrongful  
19 denial of insurance coverage supports only a claim for breach of  
20 contract, not for tort. Debtor responds that the tort claims for bad  
21 faith are cognizable under Oregon law, because General undertook to  
22 defend and indemnify debtor in earlier claims against it for sexual  
23 misconduct by its personnel, and its change of position in denying  
24 defense and coverage of later claims constitutes a tortious breach of  
25 duty that sounds in tort.

1 The Oregon Supreme Court has addressed when a contractual  
2 relationship can give rise to tort liability. In Georgetown Realty, Inc.  
3 v. Home Ins. Co., 313 Or. 97, 102 (1992), the court explained that,  
4 "where a duty arises from a contractual relationship between the parties,  
5 a tort may lie." Not all breaches of contract constitute torts, however.  
6 In determining whether an action sounds in contract or in tort, the  
7 critical question is whether the relationship between the contracting  
8 parties gives rise to obligations independent of the contract. Id. at  
9 110.

10 When the relationship involved is between contracting parties, and  
11 the gravamen of the complaint is that one party caused damage to the  
12 other by negligently performing its obligations under the contract,  
13 then, and even though the relationship between the parties arises  
14 out of the contract, the injured party may bring a claim for  
15 negligence if the other party is subject to a standard of care  
16 independent of the terms of the contract. If the plaintiff's claim  
17 is based solely on a breach of a provision in the contract, which  
18 itself spells out the party's obligation, then the remedy normally  
19 will be only in contract, with contract measures of damages and  
20 contract statutes of limitation. That is so whether the breach of  
21 contract was negligent, intentional, or otherwise.

22 Id. at 106.

23 Specifically with regard to the breach of the duty of good faith by  
24 an insurer, the court has held that, where an insurer undertakes the  
25 defense of a claim against an insured, it has a duty arising outside the  
26 contract to act in good faith in the defense of the claim, the breach of  
27 which sounds in tort.

28 When a liability insurer undertakes to "defend," it agrees to  
29 provide legal representation and to stand in the shoes of the party  
30 that has been sued. The insured relinquishes control over the  
31 defense of the claim asserted. Its potential monetary liability is  
32 in the hands of the insurer. That kind of relationship carries with  
33 it a standard of care that exists independent of the contract and

1 without reference to the specific terms of the contract.

2 Id. at 110-111. Thus, while an insurer may be liable in tort for  
3 undertaking the defense of a claim against an insured, an insurer's  
4 failure to undertake the defense at all can only be a breach of contract.  
5 Farris v. U.S. Fid. & Guar. Co., 284 Or. 453, 465 (1978).

6 Debtor neither alleges nor provides evidence in response to  
7 General's motion for summary judgment that General undertook to defend  
8 any particular claim against debtor and then breached its duties to  
9 defend in good faith. The allegations and evidence show that General  
10 defended and paid on some claims, but then refused to defend additional  
11 claims against debtor. Under the Oregon authorities cited above, failure  
12 to undertake the defense of a claim does not constitute tort, but only  
13 breach of contract.

14 Acknowledging that, under Oregon law, there is no tort liability for  
15 an insurer's refusal to defend, debtor argues that the facts underlying  
16 these claims fall within the tort duty imposed on an insurer, because the  
17 insurer did not refuse to defend at all, but instead undertook defense of  
18 some claims against debtor, while refusing to defend others. It asserts  
19 that General's "actions are more akin to the withdrawal from the defense  
20 than a situation where an insurer makes a one-time decision not to defend  
21 a single claim." Plaintiff's Response in Opposition to General's and  
22 Safeco's Motions for Summary Judgment at 11.

23 This argument ignores the reason why tort liability can exist for  
24 breach of duties undertaken when an insurer takes over the defense of a  
25 claim against an insured. The Oregon Court of Appeals explained the  
26

1 rationale for allowing recovery in tort for an insurer's failure to  
2 settle within the policy limits:

3 The insurer is held to a duty of good faith because having  
4 undertaken the defense, the interests of the insurer come into  
5 conflict with the interests of the insured when there is a  
6 probability that the judgment will be greater than the policy  
7 limits. In that case, the insurer has everything to gain and  
nothing to lose by rejecting a settlement offer for the policy  
limits. The [Supreme Court concluded] that that rationale does  
not apply when the insurer fails to undertake the defense of the  
claim . . . .

8 Because the duty to exercise due care in the defense of a claim  
9 against the insured arises from the control the insurer exercises  
10 over the defense and settlement by reason of its undertaking defense  
11 of the claim, failure to defend constitutes only a breach of  
contract, whether the breach results in a judgment within or outside  
the policy limits. If the defense is not undertaken, the duty to  
exercise reasonable care does not arise.

12 Warren v. Farmers Ins. Co. of Oregon, 115 Or. App. 319, 324-25

13 (1992)(emphasis supplied). The special relationship giving rise to  
14 duties outside the contract exists because

15 one party has relinquished control over the subject matter of the  
16 relationship to the other party and has placed its potential  
monetary liability in the other's hands. In all those  
relationships, one party has authorized the other to exercise  
17 independent judgment in his or her behalf and, consequently, the  
18 party who owes the duty has a special responsibility to administer,  
oversee, or otherwise take care of certain affairs belonging to the  
other party.

20 Conway v. Pacific University, 324 Or. 231, 241 (1996).

21 Nothing in that reasoning supports a view that, once an insurer  
22 agrees to defend one claim brought against an insured, it must continue  
23 to defend all other claims brought against the insured, even similar  
24 claims, or risk incurring tort liability. Because it is the  
25 relinquishment of control over the claim that gives rise to the  
26



1 extracontractual duty, the breach of which constitutes a tort, and there  
2 is no relinquishment of control to the insurer when it fails to undertake  
3 the defense of a particular claim, the refusal to defend a claim does not  
4 give rise to the duty, even if the insurer has defended multiple other  
5 claims before the refusal. As in Strader v. Grange Mut. Ins. Co., 179  
6 Or. App. 329, 335 (2002), debtor "did not delegate to defendant the full  
7 authority to determine, on plaintiff's behalf, how much money plaintiffs  
8 would receive" on the claims. As in Strader, the insurance company in  
9 this case, in denying a duty to defend, "was not, by virtue of its status  
10 or role, dedicated to furthering plaintiff's interests." Id. Under  
11 Oregon law, the insurer's conduct may constitute a breach of contract,  
12 but it does not constitute a tort.

13 At the hearing on this motion, debtor argued that General had  
14 fiduciary duties to debtor with regard to the lump sum of insurance  
15 coverage, which it breached by paying on earlier claims and then denying  
16 coverage on later claims. It points to no Oregon law that would support  
17 the proposition that paying some claims gives rise to a fiduciary duty to  
18 protect the insured in the disbursement of the entire pot of available  
19 insurance funds. The Oregon law is clear that the extracontractual duty  
20 of an insurer to an insured arises when the insurer takes over the  
21 defense of a claim from the insured, because the insured's economic  
22 interests are in conflict with the economic interests of the insurer. I  
23 find no authority for the imposition of a fiduciary duty on an insurer  
24 that refuses to defend.

25 Debtor argues that, "at a minimum, there is an unresolved issue of  
26

1 material fact as to whether Safeco/General has undertaken the defense of  
2 the Archdiocese in sexual misconduct cases as a result of its past  
3 actions." Plaintiff's Response in Opposition to General's and Safeco's  
4 Motions for Summary Judgment at 11. However, viewing the evidence debtor  
5 provided in the light most favorable to debtor, as the party opposing the  
6 motion for summary judgment, there is no question of fact. Debtor  
7 submitted the declaration of Kieran Curley in support of its opposition  
8 to the motion for summary judgment.<sup>3</sup> That declaration and the exhibits  
9 attached to it indicate that debtor tendered to Safeco/General defense of  
10 two claims involving Maurice Grammond, which General refused to defend.  
11 Declaration of Kieran Curley at ¶ 5; Exh. 6.<sup>4</sup> Thereafter, General denied  
12 coverage of a claim involving Father Aldo, but continued to participate  
13 in the defense through settlement. Id. at ¶ 6; Exh. 7. General has  
14 denied and continues to deny coverage of numerous additional claims. Id.  
15 at ¶ 9; Exh. 14.

16 Debtor has presented no evidence that General undertook to defend a  
17 claim against debtor and then performed its duty to defend negligently or  
18 in bad faith.<sup>5</sup> The evidence is that the insurer refused to defend.

---

19  
20 <sup>3</sup> General raises numerous objections to debtor's evidence.  
21 Because the evidence, if admissible, does not support debtor's claims, I  
need not resolve the evidentiary objections.

22 <sup>4</sup> Safeco/General contributed to defense costs, but did not  
23 undertake the defense.

24 <sup>5</sup> The evidence presented by debtor shows that the only claim  
25 General undertook to defend was a claim concerning conduct of Father  
26 Aldo, which debtor says General defended through settlement. Debtor does  
not allege or show any bad faith in the defense of that claim, or any  
(continued...)

1 Under Oregon law, that refusal may constitute a breach of contract, but  
2 it does not constitute a tort.

3 Debtor points out that there has been criticism of this distinction  
4 between refusing to defend and undertaking the defense but performing it  
5 badly. The Oregon Court of Appeals said:

6 In all fairness, it is difficult to see why the insurer should be in  
7 a better position by refusing to defend and thereby breaching the  
8 insurance contract than it would have been had it undertaken the  
9 defense but done so negligently. We fail to see any principled  
10 distinction between the conflict of interest that exists when an  
11 insurer makes a decision whether to defend and the conflict that  
12 exists when, having undertaken the defense, a settlement opportunity  
arises that would cost the insurer its policy limits but would  
result in no personal liability for the insured. Were we writing on  
a clean slate, we might reach a different result. However, Farris  
dictates the result in this case: If an insurer does not defend a  
claim, and thereby breaches its contract with the insured, its  
liability, if any, is only for breach of contract, not for a tort.

13 Warren v. Farmers Ins. Co. of Oregon, 115 Or. App. 319, 326 (1992).

14 Nonetheless, as the court of appeals recognized, the distinction is the  
15 law of Oregon, and that is the law that I must apply in this case.

16 Debtor does not distinguish among its three tort claims, calling  
17 them as a group "bad faith claims," Plaintiff's Response in Opposition to  
18 General's and Safeco's Motions for Summary Judgment at 9, and the  
19 allegations of all three are very similar. In none does debtor allege  
20 that General undertook the defense of any particular claims, and for none  
21 does debtor provide evidence to show that General undertook the defense  
22 and performed the defense badly. At bottom, all are tort claims for  
23 breach of a duty by failing to defend the underlying claims. Because  
24

---

25 <sup>5</sup>(...continued)  
26 damage caused by the way in which General conducted the defense.

1 under Oregon law a tort duty can arise only if the insurer undertakes the  
2 defense, debtor's fourth, fifth, and sixth claims for relief fail as a  
3 matter of law. General is entitled to summary judgment on those claims.

4 B. Third Claim for Relief

5 The third claim is titled "Breach of Contractual Duty of Good Faith  
6 and Fair Dealing." Debtor alleges in this claim that the insurance  
7 policies provide that General is obligated to defend and indemnify it for  
8 claims of sexual misconduct by its personnel, and that General's refusal  
9 to accept coverage or perform the duties owed under the policies  
10 constitutes a breach of the contractual obligations and of the implied  
11 duty of good faith and fair dealing. General argues that debtor's  
12 characterization of the claim as one for breach of contract "is belied by  
13 Plaintiff's complaint, which describes the third through sixth claims for  
14 relief as 'Tort Claims.'" Reply Memorandum in Support of General's  
15 Motion for Partial Summary Judgment at 7.

16 General is correct that, in paragraph 6 of the complaint, debtor  
17 uses a heading titled "Claims Three, Four, Five, and Six-Tort Claims  
18 against Safeco." However, the text of that paragraph begins, "The  
19 Archdiocese asserts claims for Breach of Contractual Duty of Good Faith  
20 and Fair Dealing, Tortious Breach of the Implied Duty of Good Faith and  
21 Fair Dealing, Tort of Bad Faith, and Breach of Fiduciary Duty . . . ."  
22 The title given to the third claim, which precedes the allegations of  
23 that claim, is "Breach of Contractual Duty of Good Faith and Fair  
24 Dealing." Complaint at 14. The factual allegations are that General  
25 breached its contractual duties, either express or implied, under the  
26

1 insurance policies. The claim is one for breach of contract, not tort,  
2 despite debtor's inept lumping of this claim together with the bad faith  
3 tort claims in its sixth paragraph of the complaint.

4 In its reply brief, General argues that the third claim should be  
5 dismissed, however characterized, because Oregon does not recognize a  
6 claim for breach of the covenant of good faith and fair dealing, where  
7 the breach is based on non-performance of an express contractual  
8 provision.

9 Good arguments can be made that the court should not consider this  
10 argument. General's motion for partial summary judgment says that it is  
11 seeking summary judgment

12 on the third, fourth, fifth, and sixth claims for relief based on  
13 two issues of law.

14 First, General moves on the basis that Oregon law does not  
15 recognize extra-contractual tort claims against an insurer premised  
16 on its denial of coverage.

17 Second, General moves on the basis that any such tort claims,  
18 even if they were cognizable, are time barred[.]

19 General's Motion for Summary Judgment on Third, Fourth, Fifth, and Sixth  
20 Claims for Relief at 2. General's supporting memorandum treats the third  
21 claim for relief as one for a tort, and argues that debtor's "extra-  
22 contractual" claims for bad faith are not cognizable under Oregon law.  
23 Memorandum of Points and Authorities in Support of General's Motion for  
24 Partial Summary Judgment at 4-5. In its opening brief, General argues  
25 only that there can be no tort liability for denials of insurance  
26 coverage or defense. It acknowledges that "under Oregon law, even a  
wrongful denial of coverage can support *only* a claim for breach of

1 contract, not one sounding in tort." Id. at 4 (emphasis in original).  
2 It is only in its reply, responding to debtor's explanation that the  
3 third claim for relief is one for breach of contract, not tort, that  
4 General argues that a contract claim is not cognizable under Oregon law,  
5 either.

6 Generally, it would be unfair to allow General, in its reply, to  
7 change its argument from one asserting that any tort claims for denial of  
8 a defense or insurance coverage are not cognizable under Oregon law, to  
9 one that Oregon law would also not recognize a claim for breach of  
10 contract. Because I find General's argument to be without merit, I will  
11 to address it at this juncture despite debtor's lack of an opportunity to  
12 respond.

13 In Oregon, there is an implied "obligation of good faith in the  
14 performance and enforcement of every contract." Best v. U.S. Nat'l Bank  
15 of Oregon, 303 Or. 557, 561 (1987).

16 The implied covenant serves to protect the objectively reasonable  
17 contractual expectations of the parties. . . .

18 Significantly, the duty of good faith and fair dealing cannot  
19 contradict an express contractual term, nor does it provide a remedy  
20 for an unpleasantly motivated act that is permitted expressly by  
21 contract. Thus, the terms of a contract help serve to define the  
objectively reasonable expectations of the parties. As a corollary  
to that proposition, a party invoking an express contractual right  
does not, merely by doing so, violate the duty of good faith.

22 Stevens v. Foren, 154 Or. App. 52, 58 (1998). Parties to a contract can  
23 recover for breach of that "obligation just as they could for the breach  
24 of any other contractual obligation." Best, 303 Or. at 561.

25 General argues for the first time in its reply brief that Oregon law  
26

1 does not recognize an action for breach of contract, under the  
2 circumstances alleged here. It asserts that the implied covenant of good  
3 faith applies only where the contract gives one party discretion in the  
4 performance of some aspect of the contract, and is breached only where  
5 the party exercises the discretion for purposes not contemplated by the  
6 parties, citing Best. Although Best involved a situation where the  
7 contract did provide discretion to one party, which discretion the party  
8 was required to exercise in good faith, 303 Or. at 563, the Oregon Court  
9 of Appeals has made clear that the implied covenant of good faith "is  
10 implied by law into every contract, not just those that necessitate the  
11 exercise of discretion." McKenzie v. Pac. Health & Life Ins. Co., 118  
12 Or. App. 377, 381 (1993)(emphasis in original).

13 General also argues that breach of the implied covenant of good  
14 faith and fair dealing does not give rise to a contract claim where the  
15 underlying contract is one for insurance coverage. In General's view,  
16 the scope and effect of the covenant of good faith and fair dealing are  
17 defined in Georgetown Realty, and give rise only to tort liability for  
18 breach.

19 There is nothing in the Oregon case law that would exclude insurance  
20 contracts from the contractual implied duty of good faith and fair  
21 dealing. In fact, in McKenzie, the court of appeals specifically applied  
22 the implied duty of good faith to a contractual claim against a health  
23 insurer, holding that, "within defendant's obligation to pay all covered  
24 claims was the duty to determine, in good faith, whether a claim is  
25 covered, and to refrain from arbitrarily refusing to pre-authorize  
26

1 medical treatment." 118 Or. App. at 381. Similarly, in Farris, an  
2 insurer's bad faith in denying coverage was considered a breach of  
3 contract, not a tort, because the insurer had not undertaken the defense  
4 of the claim. 284 Or. at 465.

5 Finally, General argues that there can be no contractual claim for  
6 breach of the implied covenant of good faith and fair dealing where the  
7 plaintiff alleges non-performance of an express contractual provision.  
8 General is correct that, if a contract expressly provides for a  
9 particular remedy for breach, the party's invocation of that remedy  
10 cannot be a violation of the covenant of good faith and fair dealing.  
11 "The obligation of good faith does not vary the substantive terms of the  
12 bargain or of the statute, nor does it provide a remedy for an  
13 unpleasantly motivated act that is expressly permitted by contract or  
14 statute." U.S. Nat'l Bank of Oregon v. Boqe, 311 Or. 550, 567 (1991).

15 Debtor does not allege here that General was entitled to deny  
16 coverage of the underlying claims, but acted in bad faith in exercising  
17 that right. Instead, it alleges that General denied coverage under the  
18 contract, which violated the terms of the contract, and that its wrongful  
19 refusal to abide by the terms of the insurance contract was a breach of  
20 the implied duty of good faith and fair dealing. Under the allegations  
21 of the complaint, denial of coverage was not permitted by contract, so  
22 the obligation of good faith and fair dealing does not vary the  
23 substantive terms of the agreement. General is wrong that there can be  
24 no claim under Oregon law for breach of the implied covenant of good  
25 faith and fair dealing when the insured alleges breach of particular  
26



1 provisions of the insurance contract. See, e.g., McKenzie, 118 Or. App.  
2 at 381 (breach of implied duty of good faith based on breach of express  
3 provision of contract). It is not entitled to summary judgment on the  
4 third claim for relief.

5 2. Statute of limitations

6 General also argues that the four claims are barred by the two-year  
7 tort statute of limitations. Because I conclude that the three tort  
8 claims fail as a matter of law, I need not address whether those claims  
9 were brought within the tort statute of limitations. With regard to the  
10 third claim for relief, as I explain above, it is for breach of contract,  
11 not tort, so the tort statute of limitations does not apply. Contract  
12 claims have a six-year statute of limitations. ORS 12.080. General does  
13 not assert that the six-year statute of limitations has run on the  
14 contract claim.

15 CONCLUSION

16 Under Oregon law, neither the allegations of the complaint nor the  
17 evidence presented support a tort claim arising out of General's alleged  
18 breach of the insurance contract. Therefore, General is entitled to  
19 summary judgment on the fourth, fifth, and sixth claims for relief.

20 General's arguments for dismissing the third claim for relief fail  
21 under Oregon law. The contract claim is not barred by the statute of  
22 limitations. General's motion for partial summary judgment on the third  
23 claim for relief will be denied.

24 Mr. Prough should submit an order stating that, for the reasons set  
25 out in this Memorandum Opinion, General's motion for summary judgment is  
26

1 denied on plaintiff's third claim for relief and is granted on  
2 plaintiff's fourth, fifth, and sixth claims for relief.

3  
4 cc: Michael D. Prough  
5 Teresa H. Pearson  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26